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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

L. P. PATTERSON, et al., *Petitioners,*

v.

NATIONSBANK OF TEXAS, N.A., et al., *Respondents.*

consolidated with

L. P. PATTERSON, et al., *Petitioners,*

v.

BANK ONE, TEXAS, N.A., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' CONSOLIDATED REPLY TO BRIEFS IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THIS COURT:

The petitioners, referred to below as the "State Representatives" or "Legislative Committee," now file their consolidated reply in support of petition for writ of certiorari:

THE BANKS' ARGUMENTS FOR DENYING THE PETITION LACK MERIT.

A. This issue is likely to recur; the Banks' arguments to the contrary wrongly assume the States cannot legislate in the field of national banking and that state subpoena power is inconsequential.

The Banks assert this case arose out of "unusual circumstances," and that the issue--whether legislative subpoenas are preempted by the Federal Reserve Act (the "Act"), 12 U.S.C. §484--has now been litigated for the first and last time. N.B. at p. 5. [1] This argument makes sense only if one assumes the States cannot, or will not, legislate in the area of national banking. But although there is little doubt that Congress could exercise its commerce power to exclude state control over national banks, it has not done so. In only a few instances has Congress explicitly preempted state regulation of national banks. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980).

The Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal") recently reaffirmed the States' continuing regulatory authority over national banks in the areas of community reinvestment, consumer protection, fair lending and the establishment of branches. *See* Pub. L. No. 103-328, § 102(b) 108 Stat. 2338 (1994) (amending 12 U.S.C. § 36). Despite

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1 "N.B. at p. ___" refers to the Brief of NationsBank in Opposition to Petition for Certiorari. "B.O. at p. ___" refers to Brief of Bank One in Opposition to Petition for Certiorari.

congressional support for dual regulation, the court below accepted the sweeping argument that a state legislative committee drafting or studying legislation may not compel national banks to disclose information.

The Banks' response also assumes that subpoena power is inconsequential to the legislative process. But state legislatures, like the courts, cannot intelligently address questions of policy without an understanding of the facts. The decision below, upholding the Comptroller's construction of the Act, hinders the efforts of state legislatures to educate themselves about the very areas in which they may legislate. As long as regulation of national banking is one of dual control, that decision will have wide application and serious consequences.

The Banks argue this case is unique because they cannot find another reported case in which a bank and a legislative committee litigated the definition of "visitorial." In other words, because this particular controversy has not been the subject of a reported case, it must be "unusual" and therefore lacking in importance. But the importance of a case rests not on the existence of other cases with identical facts, but on the important and recurring nature of the issue raised: the meaning of "visitorial" under 12 U.S.C. § 484. As the numerous cases interpreting the term "visitorial" show, this issue has been a source of repeated conflict in the law.[2] The distinguishing

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2 *See Guthrie v. Harkness*, 199 U.S. 148, 156-58 (1905) (inspection of bank records by shareholder held not to be visitorial); *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881) (county tax audit held not to be visitorial); *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749, 751 (7th Cir. 1945), (subpoena by Office of Price Administration for bank records held not to constitute exercise of visitorial power), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.) (NLRB subpoena requesting bank records held not to constitute exercise of visitorial power), *cert. denied*, 326 U.S. 731 (1945); *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105-106 (D.C. Cir. 1939) (SEC subpoenas for

facts here--that the OCC is now attempting to preempt a core function of the State itself--make this case more, not less, important.

B. The Banks' argument that the "plain statement rule" does not apply is clearly wrong.

1. State sovereignty is endangered by the decision below.

The Banks contend that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is inapposite. Because the States are not involved in the regulation of national banking, their reasoning goes, state sovereignty is not endangered. N.B. at p. 15; B.O. at p. 17. But as shown above, this is incorrect: the States can and do enact laws affecting both state and national banks. The Legislative Committee's petition clearly presents this Court with an opportunity to amplify the holding in *Gregory*, particularly in the context of preemptive agency rulemaking. And it is of compelling importance to our federalist system that this Court do so. Under the reasoning of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S.

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information regarding, *inter alia*, bank lending practices held not to constitute exercise of visitorial power); *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254, 258-259 (W.D. Va. 1978) (SEC subpoena for bank records held not to constitute exercise of visitorial power); *FTC v. Rockefeller*, 441 F.Supp. 234, 243 (S.D.N.Y. 1977) (FTC subpoenas for bank records held not to constitute exercise of visitorial power); *Best v. United States Nat'l Bank*, 739 P.2d 554, 563 (Or. 1987) (class action by depositors to inspect bank records to determine whether NSF charges 'cost justified' and consistent with state contract law held not to constitute exercise of visitorial power); *State v. First Nat'l Bank*, 313 N.W.2d 390, 392-395 (Minn. 1981) (examination of records of national banks by state treasurer to enforce state unclaimed property laws held not to constitute exercise of visitorial power); *Clovis Nat'l Bank v. Callaway*, 364 P.2d 748, 756 (N.M. 1961) (enforcement of New Mexico unclaimed property law against national banks held not to constitute exercise of state visitorial power); *State v. First Nat'l Bank of Portland*, 123 P. 712, 714-716 (Or. 1912) (audit by Oregon Attorney General to enforce escheat laws to unclaimed bank deposits held not to be visitorial).

528, 556 (1985), the "built-in restraints" of state participation in the national political process "ensure that laws that unduly burden the States will not be promulgated."

But if an ambiguous or silent federal statute is later interpreted by an agency administrator to override state sovereignty, and if the courts see themselves as constrained to give "controlling weight" to the agency's construction, the States will lose the slender procedural guarantee identified in *Garcia*.[3] This procedural guarantee is of even greater importance when the preempted state activity is an exercise of sovereignty of the most fundamental sort. The legislative subpoenas here carry this case well beyond those areas traditionally regulated by the States and into the very heart of effective state government.[4]

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3 *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-25, at 480 (2nd Ed. 1988) ("to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests") (emphasis in original); *The Supreme Court, 1987 Term--Leading Cases*, 102 HARV.L.REV. 143, 296 (1988) ("A rule that distills displacement of state law from congressional *silence* divests states of even *Garcia's* slender procedural guarantee") (emphasis in original); *see also Welch v. State Depart. of Highways & Public Transp.*, 780 F.2d 1268, 1276 (5th Cir. 1986) (Higginbotham, J., specially concurring) (if a statute containing ambiguity regarding its preemptive effect is subsequently construed by a Court to override state sovereignty, the states will "have been effectively sandbagged"), *aff'd*, 483 U.S. 468 (1987).

4 The Banks suggest that this case is no different than *NationsBank v. Variable Annuity Life Insurance Co.*, 115 S.Ct. 810, 813-14 (1995) ("*VALIC*"). B.O. at p. 8; N.B. at p. 6. But *VALIC* did not involve an agency construction that preempted a core power of the States. The flaw in the Banks' response is that it leaves out, altogether, the Tenth Amendment. The federal government is intended to be a government of limited powers, while the States are envisioned as retaining substantial sovereign authority. U.S. CONST., Amend. X. This federalist structure of dual sovereignty is viewed as preserving to the people numerous advantages. *See Gregory v. Ashcroft*, 501 U.S. 452, 456-65 (1991).

2. Section 484 does not contain language clearly preempting these subpoenas.

The Banks next argue that the Legislative Committee's reliance on *Gregory* is misplaced, because section 484 contains plain language preempting these subpoenas. Even though the district court concluded that in using the term "visitorial" Congress had not "directly spoken to the precise question at issue" (A-5), the Banks now contend that the term's preemptive effect is unmistakably clear. N.B. at p. 7; B.O. at p. 15. Their position is, however, contrary to the common law, the case law interpreting the statute and the statute itself.

a. The Banks' interpretation of "visitorial" is inconsistent with the common-law definition.

Section 484 derives almost unchanged from § 54 of the National Bank Act of 1864. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version at 12 U.S.C.A. §§ 21-215b (West 1989 & Supp. 1994)). Long before Congress passed the 1864 Act, concepts of visitation were firmly established in the common law. "Visitorial" authority meant the power *to enforce* laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter. *See Dartmouth College v. Woodward*, 7 U.S. (4 Wheat. 673) 518 (1819) (Story, J.); *Allen v. McKean*, 1 F. Cas. 489, 497 (C.C.D. Me. 1833).

The Banks' interpretation necessarily infers legislative intent to alter these common-law concepts in what is now section 484. But statutes are not construed in derogation of the common law, absent clear legislative intent. *See United States v. Texas*, 113 S.Ct 1631, 1634 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent

evident statutory purpose to the contrary); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.").

b. Overwhelming case law applying the common-law definition to section 484 also undercuts the Banks' arguments.

Not surprisingly, the courts have applied the common-law definition of "visitorial" to the language in 12 U.S.C. § 484. In the leading case of *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740-741 (C.C.N.D. Ohio, 1881), a county tax auditor subpoenaed bank records pertaining to the names of the bank's depositors and the amounts of their deposits. The court held that since the auditor had no power to supervise or control the bank's operations, his subpoena was not an exercise of visitorial power. *Hughes*, 6 F. at 740-41.

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), this Court expressly adopted the *Hughes* definition. Quoting favorably from the "learned judge" in *Hughes*, this Court stated: "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce a due observance of its laws and regulations." *Guthrie*, 199 U.S. at 158. Since then, the state and federal courts have consistently followed *Guthrie* and *Hughes*. *See* cases cited *supra* note 2.

c. The current version of the Act, including the 1982 amendments, does not overrule the *Hughes* line of cases.

Had Congress disagreed with the courts' interpretation, it surely would have amended the statute to overturn these cases. Yet Congress has never sought to repudiate the *Hughes* line of cases. In the 1982 amendments to the Act it continued to rely on the term "visitorial," rather than substituting a broader term such as "discovery" or "inspection," or "review of records."

The new subsection (b) did nothing to change the meaning of "visitorial" in subsection (a), and the Banks' suggestion to the contrary is supported by nothing in the text of the amendment. The Banks repeatedly assert that subsection (b) refers to "state officials" or "state authorities." B.O. at p. 10; N.B. at p. 8. But significantly, subsection (b) does not use those terms; it refers, more narrowly, to "*state auditors and examiners*" who may review a national bank's records only "*to ensure compliance with applicable State unclaimed property or escheat laws.*" This phrasing strongly suggests that Congress understands the term "visitorial" in section (a) to be an *official* examination or audit to enforce laws that regulate the bank. State legislators gathering information in order to draft or propose legislation are not commonly understood to be "state auditors and examiners."

Nor is there anything in the legislative history indicating that the 1982 amendments were intended to overturn the courts' interpretation of "visitorial." The amendments are said to accompany extensive new provisions clarifying the law of unclaimed bank deposits for bank insurance purposes. *See* S. Rep. No. 536, 97th Cong., 2nd Sess. 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3083. If Congress had intended to overturn or limit one

hundred years of case law interpreting "visitorial," one would have expected it to at least mention this objective in the legislative history.[5]

NationsBank also makes much of the language in section 484(a) excepting from "visitorial" those powers that "have been exercised or directed by Congress . . ." N.B. at p. 8. The Bank reasons that if legislatures were not included within the definition of "visitorial," it would not have been necessary to specifically exempt Congress. The Bank, however, reads far too much into this language.

Without question, the national government, as the founder of the corporate charter for a national bank, is the legal visitor. This visitorial power is vested in Congress, as noted in *Guthrie*. *Guthrie*, 199 U.S. at 158 (quoting 1 COOLEY'S BLACKSTONE COMMENTARIES 482, note). Congress, of course, has delegated this power to the OCC. The Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028 (codified in scattered sections of 12 U.S.C.); *see also National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980). The national legislature continues, however, to be the ultimate source of visitorial authority and directs the exercise of that power by virtue of its oversight responsibility vis-à-vis the OCC.

The language of section 484(a), excepting such power as has been or shall be "exercised or directed by Congress," is entirely consistent with Congress' historic role as visitor of all nationally

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5 Congress certainly knew how to make its intent to overturn case law clear. It is instructive to compare the legislative history accompanying the 1982 amendments to § 484 with the conference report accompanying Riegle-Neal: "The amendment made to the Home Owners Loan Act by section 102(b)(5) of the bill overturns an interpretation of that Act in *First Gibraltar Bank v. Morales*, (5th Cir., Dkt. 93-8170, decided on April 29, 1994)." Conf. Rep. to Accompany H.R. 3841, H. Rep. 651, 103rd Cong., 2d sess. 57-58 (1994).

chartered corporations and its delegation of those powers to various federal agencies. However, Congress is the visitor of national corporations not by virtue of its power to enact laws, but by virtue of its authority "*to direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause a forfeiture of their charters.*" *Guthrie*, 199 U.S. at 158 (emphasis added). Even setting aside the history of visitation at the national level, the most that can be gleaned from this language is that Congress intended to make clear its continuing authority over national banks.

It is one thing to note the national legislature's historic powers of visitation over national corporations; it is quite another to leap to the conclusion that all legislatures everywhere have visitorial authority. This is not the case. Indeed, the Texas legislature cannot even exercise such authority over state-chartered corporations. In Texas, exclusive visitorial power is vested in the Texas Attorney General. TEX. REV. CIV. STAT. ANN. art. 1302-5.01, *et seq.* (Vernon 1980 & 1995 Supp.); *Humble Oil & Refining Co. v. Daniel*, 259 S.W.2d 580, 589 (Tex. Civ. App.--Beaumont 1953, writ ref'd n.r.e.), *cert. denied*, 347 U.S. 936 (1954).

Further, the Banks' erroneous conclusion that all legislatures have visitorial power does not complete the analysis. As is made clear in *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254 (W.D.Va. 1978), a claim of visitation must stand or fall based on a determination of the purpose of the investigation, because "any inquiry into the operations of a bank is not automatically a 'visitorial power' which is prohibited." *Id.* at 259. As there is no dispute that the Committee's subpoenas are not for the purpose of supervising or controlling the Banks, they cannot, as a matter of law, be visitorial.

In sum, the Banks have argued that, as the term "visitorial" clearly and unmistakably preempts these subpoenas, *Gregory* does

not apply. But, if anything, the common law, case law and 1982 amendments show just the opposite: that Congress did not intend to preempt this type of state activity. It follows, inescapably, that the Comptroller's construction is both clearly unreasonable and at odds with the teachings of this Court in *Gregory*.

C. *Long* does not stand for the proposition that legislative subpoenas are visitorial.

Both Banks rely on *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980). B.O. at p. 8; N.B. at p. 7. However, the Banks have loaded *Long* with far more freight than it can carry. That case held only that the New Jersey Banking Commissioner, whose powers over state-chartered banks correspond to those of the OCC at the national level, would exercise visitorial power if he were *to enforce* the state's anti-redlining laws against national banks. *Long*, 630 F.2d at 988. Plainly, this holding does not control the legislative subpoenas here and is entirely consistent with the Legislative Committee's position that visitorial power is, at a minimum, the power to enforce laws regulating the Banks.

Of greater relevance in *Long* was the conclusion that though the OCC (instead of the New Jersey Banking Commissioner) would have the visitorial responsibility for enforcing compliance with New Jersey's anti-redlining law, the substance of the state law itself was not preempted. *Long*, 630 F.2d at 986-87. *Long*, it turns out, stands with those cases illustrating that regulation of banking is one of dual control.

D. The petition presents an issue of law; none of the factual assertions by the Banks are relevant to the issue of whether these subpoenas are visitorial.

The issue of whether section 484 preempts the Legislative Committee's subpoenas is a question of law. As noted above, a claim of visitation must stand or fall based on a determination of the purpose of the investigation. *Williams*, 449 F.Supp. at 259. As a matter of law, neither the Committee nor the Texas Legislature as a whole has the power to prosecute violations of law, the power to audit the books and records of a corporation, the power to bring a *quo warranto* action for forfeiture of a corporate charter, or the power to place the assets of a corporation in receivership. The Committee can only conduct studies and propose legislation to the full House. The Committee's subpoena power to compel testimony and the production of documents relates only to its need to properly inform itself in the drafting and proposing of legislation.

The Banks' factual assertions are immaterial to the question of law before this Court. The Banks, for example, raise the issue of "motive," portraying the subpoenas as a "circuitous attempt to regulate national banks" and as "the work of single individual who desires to conduct an inquisition into the lending activities of a national bank . . . to accomplish by subpoena what that individual could not accomplish by legislation." B.O. at p. 3; N.B. at p. 4. As support, the Banks point to speeches made by Rep. L.P. Patterson, Chairman of the Committee, criticizing national banks and to legislation he sponsored that would have subjected them to additional regulation. N.B. at p. 3; B.O. at p. 3.

But the fact that a state representative has made political speeches and sponsored legislation is hardly material to whether section 484 preempts these legislative subpoenas. Moreover, Rep.

Patterson did not single handedly issue the subpoenas in this case, nor could he. Subpoenas must be issued by a two-thirds majority of Committee members, and here, they were issued upon an 8-1 vote in favor of the subpoenas. (App. 52-53; R.NB. Vol. 1, 0011-23, 0127-28). In suggesting the motivations and past legislative initiatives of a state representative are somehow relevant to whether a legislative subpoena is visitorial, the Banks seem to be urging a procedure whereby federal courts look behind a lawfully issued state subpoena and examine the feelings and policy preferences of the issuing state legislator. It would be difficult to imagine a more pernicious procedure.

The Banks' complaint that Rep. Patterson has introduced several bills imposing taxes and special reporting requirements on national banks merely underscores that state legislatures can and do enact laws affecting national banks. For example, in 1995, pursuant to Riegle-Neal, the Texas Legislature passed House Bill 856, opting out of interstate branch banking. 74th Leg., R.S., Ch. 58, §§ 1-3, 1995, Tex. Sess. Law Serv. 437-38 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 489f. (Vernon Supp. 1996)). The bill prohibits out-of-state national banks from establishing de novo branches, or acquiring a branch by purchase or otherwise, in the State of Texas. This legislation alone should dispel any lingering notion that a subpoena served on a national bank can never have a legitimate legislative purpose.

Finally, the Banks place a great deal of emphasis on the scope of the subpoenas and their alleged burdensomeness. B.O. at p. 4; N.B. at p. 2. The scope of the subpoenas, however, is irrelevant to whether they are an exercise of visitorial power preempted by the Act. A legislative subpoena that is not by definition "visitorial" cannot become so simply by requesting more information. Furthermore, the record establishes that though many

categories of requested information--such as credit policies and manuals---could be provided at little or no cost to the Banks, they have refused to turn over *any* information, not just information they contend would be difficult to compile. The Banks have also refused to make their representatives available to testify. The Committee has repeatedly stated its willingness to modify the subpoenas to make the production of the information less costly and time consuming--as long as the documents provided meet the Committee's legitimate need for information. (App. 52-54; R.NB. Vol. 1, 0127-29.) But rather than working with the legislature to ensure that needed information is provided in the most efficient manner possible, the Banks have chosen litigation.[6]

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6 The Banks illogically blend their preemption argument with separate and distinct challenges to these subpoenas. Arguments that the subpoenas inquire into matters outside the jurisdiction of the Legislative Committee, or claims that the scope of the subpoenas is unduly burdensome, raise issues of state law. If the Banks seriously doubt the jurisdiction of the Committee to issue these subpoenas, they should dismiss this case and raise their claims in state court. *See American Bank and Trust Co. v. Dent*, 982 F.2d 917, 921-922 (5th Cir. 1993). NationsBank also submits as undisputed that complying with the Committee's subpoenas would require the expenditure of thousands of hours in employee time, as well as the expenditure of a million dollars or more. (R.NB. Vol. 2, 0104-06). The Committee obviously disputes this assertion, as the affidavit of Chairman Patterson shows. (R.NB. Vol. 1, 0127-30.) It is axiomatic that summary judgment is appropriate only if, after adequate discovery, there is no genuine dispute over any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To the extent that NationsBank's challenge to these subpoeans is based on allegations of burdensomeness, there is not only a factual dispute; discovery is not yet complete. Summary judgment is therefore premature.

CONCLUSION

The State Representatives' petition for writ of certiorari should be granted.

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